

NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE EU: SPANISH AND PORTUGUESE EXPERIENCES

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Abstract

The multilevel protection of human rights, through national Constitutions, European and International Conventions, is nowadays a fundamental goal at national and transnational levels. To achieve that goal, strengthening the role of the National Human Rights Institutions (NHRIs) is a priority. This article will focus a particular type of NHRIs – the Ombudsman – and will assess the Portuguese and Spanish experience in that domain, taking into account their advantages and the problems that have emerged in the national contexts.

1. Introduction

The protection of Human Rights is a fundamental goal at national and transnational levels. In fact, the core of the Constitutions of the majority of the States, at least in the western world, are the provisions concerning the promotion and protection of human rights; and the same solutions are followed at the European level. In fact, in the European Union the protection of human rights is receiving increasing attention as one of the central aims of this sui generis entity. The the legally binding nature of the Charter of the Fundamental Rights of the EU, since 2009, and the fact that the EU must accede to the European Convention of Human Rights clearly show the relevance of this fundamental goal.

On the other hand, the implementation of these legal provisions requires the creation of specific organs with certain competences in order to assure the effectiveness of human rights laws. In fact, besides the promotion and protection of human rights by national, European and international courts and by the national and European administration, other organs have been created both at European level – like the European Union Agency for the Fundamental Rights¹, the High Representative of the European Union for Foreign Affairs and Security Policy, and a Commissioner responsible for Fundamental Rights – and national levels, such as the “National Human Rights Institution”, broadly described as “an independent body established by a national government for the specific purpose of advancing and defending human rights at the domestic level”, cooperating with national and international bodies and acting as “guardians, experts or teachers of human rights”².

Strengthening the NHRIs is nowadays considered fundamental, namely by the United Nations,

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¹ Even if it is not, as rightly pointed by Wouters and others, “the EU’s NHRI”, as it doesn’t fulfill the Paris principles concerning a comprehensive mandate or pluralistic and independent position – see Jan Wouters, Katrien Meuwissen, Ana Sofia de Barros, “The European Union and national human rights institutions”, KU Leuven, *Leuven Centre for Global Governance Studies, Working Paper No. 112* – July 2013, p 7. Concerning the Paris principles, they are considered the minimum international requirements for national institutions, laying their status, mandate, composition and modus operandi; in other words, they must be State officially funded bodies, with independence, pluralism, and with broad competences.

² Anna-Elina Phjolainen, *The evolution of national human rights institutions: The role of the United Nations*, The Danish Institute of Human Rights, 2006, p. 1.

to improve human rights protection in emerging democracies and to reinforce its protection in democratic States. This view may explain the increasing number of NHRIs. In fact, the number of national institutions complying international standards rose from 8 in 1990 to 55 in 2002, presenting different profiles³, such as: (1) Human Rights Commission (the Commonwealth model, followed for instance in UK, Canada) – it is defined as collegiate bodies focused mainly on the implementation of anti-discrimination and equality laws, with “proactive and preventive” tasks, like advising and monitoring public entities and developing training activities; (2) Advisory Committee (the French model, because it is based on the example of the National Consultative Commission of Human Rights of France) – it doesn’t usually receive complaints, it just assists and advises the government and conducts studies in this area, and its composition brings together not only academics, but also practitioners as NGO human rights experts and government officials; (3) Human Rights Institute (the Danish Centre for Human Rights) – it has been presented as a “potentially interesting model for democratic states, in particular those which have already relatively well-functioning human rights structures, such as ombudsmen institutions or parliamentary complaints bodies, and do not therefore have any immediate functional need to put additional and possibly overlapping structures in place”; it doesn’t usually investigate complaints, but focuses on education, information and research activities⁴; (4) Ombudsman (the Swedish model, followed namely in Portugal and Spain) – it traditionally acted as an “administrative watchdog” monitoring the legality of public administration, but nowadays may take other tasks like promoting the protection of human rights and educational ones; nevertheless, this institution usually investigates complaints, monitors the activity of the state, can make recommendations and issues opinions on public policies; in addition, it is worth mentioning that “ombudsmen are by definition single-persons bodies, which means that the Paris principles initial requirement of pluralistic composition cannot [apparently] be fulfilled”⁵ (although, there is a relevant evolution concerning this topic). In other words, there are so many shadows in the profile of the Ombudsman in the Member States – at European, national, regional and local levels⁶ – that it is difficult to identify the main features. Nevertheless, it is pointed out that this organ, inspired by the profiles of the Swedish “Justice Counsellor”, then “Ombudsman”⁷, and developed after the Second World War (when the need to monitor public authorities activities increased and the powers of the courts, with costly and long lasting procedures, and of the Parliament, with lack of time and resources, were insufficient to do that control) must be independent (from the government), his decisions are informal and not binding, and he can receive complaints from citizens without restrictions⁸.

Nowadays, the NHRIs should comply with the Paris Principles, which were adopted unanimously in a Resolution by the UN Human Rights Committee in 1993 and in the final documents of the

³ In this article we will follow the classification suggested by Anna-Elina Pjoleinen, cf. *op.cit.*, pp. 16 ff.

⁴ *Op.cit.*, p. 19.

⁵ *Op. cit., loc. cit.* Nevertheless, this requirement will be relaxed in the future. It is also worth mentioning that nowadays the majority of models are hybrid and convergent.

⁶ Cf. Alvaro Gil Robles, “Pluralidade e singularidade do Ombudsman na comparação de experiências europeias”, in *O cidadão, o provedor de justiça e as entidades administrativas independentes*, Lisboa, Provedoria de Justiça – Divisão de Documentação, 2007, pp. 34, 36, refers as an example of local Ombudsman the Swiss model and sustains, in a convincing way, in my view, that the best model is the national model, as it is an organ that should protect citizens (his mission should not be to provide “general services”); regional and local Ombudsmen compromise, according to Gil Robles, the role of the national Ombudsman and the role of Parliament regarding citizens. Pointing in a similar direction, explaining that the existence of multiple Ombudsmen in a State (which can, in addition, be created for specific matters) increases the risk of the Ombudsman losing his independence towards the public authorities that must be monitored, cf. José Manuel Menéres Pimentel, “A pluralidade do Ombudsman: vantagens e inconvenientes para a Administração Pública”, in *O cidadão, o provedor de justiça e as entidades administrativas independentes*, Lisboa, Provedoria de Justiça/Divisão de Documentação, 2002, p. 82.

⁷ Álvaro Gil Robles, “Pluralidade e singularidade do Ombudsman na comparação de experiências europeias”, in *O cidadão, o provedor de justiça e as entidades administrativas independentes*, cit., p. 31.

⁸ Filipe Boa Baptista, “O modelo de unidade e criação de instituições afins do ombudsman: uma tensão recorrente na experiência parlamentar”, in *O cidadão o provedor de justiça e as entidades administrativas independentes*, Lisboa, Provedoria de Justiça – Divisão de Documentação, 2002, pp. 15-16.

human rights conference of 1993, and are considered the fundamental criteria for human rights institutions. They require national human rights institutions to be created under a constitutional or legislative provision, which sets the competences, tasks, and composition of the institution. In addition, the institutions must have an autonomous and independent status not only formally, but also financially and administratively and must cooperate with other human rights actors.

The Paris Principles do not advocate any particular institutional model, allowing States to develop flexible solutions, which will take into account their specificities. In other words, the Paris Principles mechanisms encompass human rights commissions, ombudsmen and specialized agencies and allow, therefore, a flexible framework of reference for the establishment of national human rights structures which can and will interact with correspondent European and international institutions.

Still, as Katrien Meuwissen⁹ explained, although the Paris principles did not prescribe a particular standard structure for NHRIs, there was, nevertheless, “a ‘commission-bias’” in the standards, which has been criticized in literature. In fact, in the beginning, the Paris Principles methods of operation suggested that some bodies – including ombudsmen – were to be considered “bodies other than NHRIs” and it is only in the mid-nineties that human rights commissions and ombudsmen have become recognized as the most important types of NHRIs¹⁰, and now UN bodies recommend the States to follow those principles whenever establishing NHRIs¹¹.

This article will focus on a particular type of NHRIs – the Ombudsman – and will address the Portuguese and Spanish experience in that domain. It will evaluate the structure, composition, organization and role of the Portuguese and Spanish institutions, the advantages of creating these institutions and the problems that have emerged in the national contexts.

2. The Portuguese Ombudsman – Provedor de Justiça

2.1. Statute

The establishment of the Ombudsman in the Portuguese legal order is prior to the 1976 Constitution of the Portuguese Republic. In fact, the institution¹² was created by the Decree-Law No. 212/75, 21 April. The following year, in 1976, the Constitution of the Portuguese Republic created in its Article 24 (now Article 23), the Ombudsman Institution. Nowadays, in addition to Article 23

⁹ Cf. Katrien Meuwissen, “The Paris principles and national human right institutions: lost in translation?”, KU Leuven, *Leuven Centre for Global Governance Studies, Institute for International law, Working Paper No. 163*, September 2015, p. 9. After the 1991 meeting, the United Nations Centre for Human Rights adopted “A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights” (1995). Another “point of criticism”, according to Katrien, cf. *op. cit.*, p. 9, is the integration of a complaints-handling function as “additional” in the Paris Principles, although Article 2 of the Paris Principles requires the mandate of NHRIs to be “as broad as possible”; this apparently might be explained as a compromise between the most influential national commissions drafting the Paris Principles (French and Australian). Nowadays the “Paris Principles’ most prominent contemporary interpretation is provided by NHRIs themselves” through the General Observations of the Sub-Committee on Accreditation (SCA) of the International Coordinating Committee (ICC) of NHRIs; the ICC Statute provides that only one NHRI per Member State of the United Nations shall be eligible to be a voting member, and that it is a voluntary process, cf. *op. cit.*, *loc. cit.*

¹⁰ Cf. *op. cit.*, *loc. cit.*

¹¹ Cf. Jan Wouters, Katrien Meuwissen, Ana Sofia de Barros, “The European Union and national human rights institutions”, KU Leuven, *Leuven Centre for Global Governance Studies, Working Paper No. 112* – July 2013, pp. 3-4. Concerning the Charter, see Sofia Oliveira Pais, “A proteção dos direitos fundamentais na União Europeia”, in *Estudos de direito da União Europeia*, Almedina, 2014, p. 137.

¹² The minimum is to decide freely and obtain the necessary information; and the national institutions should develop close cooperation with other actors. Concerning the budget of the Ombudsman’s Office, it shall be contained in the budget of Parliament (Article 43). A similar solution is followed in Spain – Article 37 Organic Act.

of the Constitution of the Portuguese Republic, the Ombudsman's statute is legally enshrined in Law No. 9/91, 9 April, which was later reviewed by Law No. 52-A/2005, 10 October, and by Law No. 17/2013, 18 February.

According to Article 23 (3) of the Constitution of the Portuguese Republic and Articles 1 (No. 1 and 4) and 7 of Law No. 9/91, 9 April, the Ombudsman is an independent institution of the Portuguese State and his holder is irremovable and elected by the Parliament by a qualified majority of the house (Article 163, paragraph h), of the Constitution of the Portuguese Republic and Articles 5 (1) and 15 of the Law No. 9/91, 9 April).

The Ombudsman's office holder is always elected for a term of four years and can only be re-elected once¹³. His duties can only cease before these four years either in the case of death permanent physical disability, loss of the requirements for being elected a Member of Parliament, or supervening incompatibility; or resignation, and these ground are verified by the Parliament¹⁴.

The Ombudsman is also an independent institution, meaning that he is not subject to the authority or supervision of another institution of the Portuguese State and, while exercising his powers; the Ombudsman shall enjoy political and criminal immunity. However, criminal immunity cannot be claimed when the Ombudsman is found in the act of committing a criminal offence punishable by three or more years in prison. Moreover, if the Ombudsman is officially accused of having committed a crime, the Parliament may choose to waive the criminal immunity¹⁵.

Finally, it is worth mentioning that in a study conducted concerning the profile of the Portuguese Ombudsman (PO), the conclusions were that Portuguese citizens considered the PO impartial and effective. The most favoured citizens also mentioned the trust in the institution, while the less favoured ones referred that it is a solution of last resort (there are no other alternatives). Either way, it is the high expectations towards this organ that are highlighted¹⁶.

In addition to the PO, the Decree-Law 158/96, September 3, created the "defender of the taxpayer" (Defensor do Contribuinte) to provide an additional guarantee to the rights and freedoms of taxpayers without compromising the powers of the Portuguese Ombudsman. This solution was criticized by the certain Portuguese authors¹⁷, because it would undermine the powers of the Portuguese Ombudsman; that body was extinguished in 2002

2.2. Competences and powers

The main duties of the Portuguese Ombudsman, according to Article 20. of Law No. 9/91, shall be:

(1) To defend and to promote the rights, freedoms, guarantees and legitimate interests of the citizens and to raise awareness of the powers of the Portuguese Ombudsman;

(2) To ensure, through informal means, that public authorities act fairly and in compliance with the law, addressing recommendations to the competent bodies with a view to correct illegal or unfair acts of public authorities or to improve their services and the administrative procedures followed by those services (and the recommendations addressed to the Parliament and to the Legislative

¹³ Article 6 (1) of the Law No. 9/91, 9 April.

¹⁴ Article 15 of the same Law.

¹⁵ Article 8 of the same Law.

¹⁶ Manuel Meirinho Martins; Jorge de Sá, *O exercício do direito de queixa como forma de participação política – O caso do provedor de justiça (1992-2004)*, Lisboa, Provedoria de Justiça, 2005, pp. 132-133.

¹⁷ Jorge Miranda, "O Provedor de Justiça: garantia constitucional de uma instituição ou garantia de uma função?", in *O Cidadão...*, cit., 2002, pp. 50-51.

Assemblies of the Autonomous Regions shall be published in their respective official journals);

(3) To point out shortcomings in legislation, to issue recommendations (which will be forwarded to the competent public authority) concerning its interpretation, amendment or revocation, or to suggest the drafting of new legislation;

(4) To issue opinions, upon request of the Parliament, on any matter related to its activity and every year he shall send a report to the Parliament on his activities;

(5) To intervene, in accordance with the applicable law, in the protection of collective or diffuse interests, whenever public authorities or companies and services of general interest, regardless of their legal status, are involved;

(6) The Ombudsman may request the Constitutional Court to declare the unconstitutionality or illegality of any legal provisions, in accordance with Article 281, paragraph 1 and paragraph 2, sub-paragraph (d), of the Constitution; in addition, the Ombudsman may request the Constitutional Court to rule on cases of unconstitutionality due to a legislative omission, in accordance with Article 283, paragraph 1, of the Constitution. In other words, citizens may complain to the PO, which will have a discretionary power to decide whether to continue the procedure or not, according to the principle of opportunity¹⁸.

This mechanism has not been used frequently as it is considered a solution of “last resort”. Between 1976 and 2006 the PO requested the Constitutional Court to rule on cases of unconstitutionality due to a legislative omission seven times (two of them were approved by the Portuguese Constitutional Court, concerning namely the need to adopt laws regarding the criminal liability of those holding political office, one was rejected and the others were dismissed because a proposal was adopted) and several times (among the more than 170 requests) has the PO invoked the unconstitutionality of the Portuguese laws (for instance, in the Seventies the PO argued that the laws that excluded certain women from certain professions –as the law providing that only single women or widows could be directors in a public institute- were unconstitutional)¹⁹;

(7) Furthermore, the Ombudsman may also be appointed to supervise the enforcement of international conventions and treaties on human rights and should guarantee the cooperation with other equivalent foreign institutions as well as with the European Union and international institutions²⁰.

In order to perform his powers, the Ombudsman can make inquiries and inspection visits. In other words, he has the power to conduct with or without prior notice inspection visits to every single sector of activity of the central, regional or local Public Administration, namely public services, military or civil prisons, undertakings and companies offering services of general interest, independently of their legal nature, or any other entities subject to the control of the Ombudsman. He has the power to listen to the respective bodies and agents and to ask for informations, as well as the documents considered relevant; to proceed with any investigations and inquiries considered needed or convenient, having the possibility to adopt, in the context of production of evidences, any reasonable proceedings regarding the respect for citizens’ fundamental rights and liberties; he has to power to search, in collaboration with other competent bodies and services, the most adequate solutions for safeguarding citizens’ legitimate interests and improving the administrative action. He shall not, however, have the power to annul, revoke or amend decisions of public authorities and sovereign bodies, and the government bodies of the Autonomous Regions shall not be subject

¹⁸ Maria Eduarda Ferraz, *O provedor de justiça na defesa da Constituição*, Lisboa, Provedoria de Justiça, 2008, pp. 54-55.

¹⁹ Maria Eduarda, op.cit., p. 190, note 254.

²⁰ Article 1 (2 and 3) of Law No. 9/91, 9 April.

to the Ombudsman's inspection and supervision²¹.

2.3. *Complaints and procedure*

Every citizen, but also any legal person²², can submit an oral or written complaint to the Ombudsman against acts and/or omissions by the public authorities in order to promote and protect the rights and liberties recognized by the Portuguese constitutional order²³. Nevertheless, the Ombudsman is not constitutionally or legally bound by the submission of complaints, since he can act by his own motion whenever aware of a situation that requires and justifies his intervention²⁴. The complaints depend neither on the complainant's direct, personal and legitimate interest nor on any time limits, and the confidentiality about the complainant identity is guaranteed, whenever requested and if justified for security reasons²⁵. In addition, procedures before the Ombudsman shall be exempt from costs and stamps and do not require the intervention of a lawyer²⁶.

The Portuguese solution that does not establish a time limit for the complainant to present a complaint has been discussed in the Portuguese literature²⁷, which sustains that it is the best option as it is a flexible and informal mechanism that promotes the protection of fundamental rights; in addition, the decisions of the PO are not binding and, therefore, do not usually affect the legal act that already produced its effects (in other words, legal certainty is not compromised).

The Portuguese Ombudsman shall assess the complaints without the power to take decisions and shall send the competent bodies the necessary recommendations in order to correct illegal or unfair acts of public authorities.

The scope of the Ombudsman's powers is extensive and far-reaching, for the Constitution of the Portuguese Republic does not draw any limit to his powers and tasks. Notwithstanding, it is clear that the scope of the powers and tasks of the Ombudsman does not cover the acts and decisions of the Courts. Besides, the Ombudsman does not have the competence to investigate and to supervise the public (sovereign) bodies and the regional Governments²⁸.

Although it is true that the powers of the Portuguese Ombudsman are broad and vast, it is also true that the natural field of the Portuguese Ombudsman intervention is related with the acts and/or omissions of the Public Administration, namely the central, regional or local Public Administration, the Armed Forces, the public institutes, the public companies, the "public service concessionaires", the independent administrative authorities and the public associations, like the bar association (Article 2 (1) of Law No. 9/91, 9 April). Additionally, the Ombudsman can also act in the context of private legal relationships, in which there is a relationship of control between the parties with the purpose of safeguarding the recognized constitutional rights and liberties (Article 2 (2) of Law No. 9/91, 9 April).

Under Article 23 (4) of the Constitution of the Portuguese Republic, it is established that all authorities and institutions of the Public Administration must cooperate with the Ombudsman,

²¹ Articles 21, 22 and 23 Law n.º 9/91. In addition, according to Articles 142, paragraph d), of the Constitution of the Portuguese Republic and 20 (3) of Law No. 9/91, 9 April, the Ombudsman has a seat at the Council of State.

²² Articles 12, 13 and 15 of the Constitution of the Portuguese Republic

²³ This right to complain to the Ombudsman represents a particular exercise of a right to petition (Article 52 (1) of the Constitution of the Portuguese Republic).

²⁴ Article 23, of the Constitution of the Portuguese Republic and Articles 3, 4, 24 and 25 of Law No. 9/91, 9 April

²⁵ Articles 24 and 25, Law No. 9/91.

²⁶ Article 39, Law No. 9/91.

²⁷ José Lucas Cardoso, "Os pressupostos de admissibilidade de queixas pelo provedor. Abertura ou restrição do acesso dos cidadãos a um órgão de defesa dos seus direitos fundamentais", *Revista de Direito Público*, n.º 2, 2009, 91-132, at 116.

²⁸ Articles 203 and 205 of the Constitution of the Portuguese Republic and Article 22 (3) of Law No. 9/91, 9 April.

providing the information and clarifications requested. The non-justified breach of the duty to cooperate is considered a crime of disobedience, notwithstanding the applicable disciplinary proceedings. The Ombudsman may also request statements or information from any citizen whenever necessary, and unjustified absence or refusal to make a statement shall constitute a qualified crime of disobedience²⁹.

To sum up, in the Portuguese legal order, the Ombudsman has mainly the power to address recommendations to all public authorities and institutions (including the Parliament and the Government), but cannot in any circumstances give orders or exercise by his own right the powers and tasks that are recognized to the other public authorities and institutions (Article 23 (1) of the Constitution of the Portuguese Republic and Articles 20 (1) and 22 (1) of Law No. 9/91, 9 April).

The Ombudsman's recommendations are addressed to the competent bodies in order to rectify the illegal or unfair act or irregular situation. The addressed bodies must notify the Ombudsman of their positions on the matter in 60 days time and the non-compliance of the Ombudsman's recommendations must be explained. If the recommendations of the Ombudsman are not attended or if the required collaboration was not provided, the Ombudsman may report to the hierarchical superior or to the competent Minister. Finally, if the recommendations of the Ombudsman are not respected or if the required collaboration was not provided by the Public Administration, the Ombudsman shall inform Parliament³⁰.

In less serious cases, the Ombudsman may simply address a critical remark to the body or the services involved or dismiss the case upon receiving explanations. On the other cases, he shall inform the complainant of the judicial (or administrative) remedies available³¹.

In addition, if sufficient evidence of criminal or disciplinary offences arises in the course of the proceeding, the Ombudsman shall inform either the Public Prosecutor or the hierarchical superior to start disciplinary proceedings and he may decide to issue statements or to publish information concerning the conclusions reached in the proceedings³².

Complaints with no possibility of identification of the complainant, manifestly unfounded and outside the Ombudsman competence, or when the invoked illegality or unfairness have already been remedied, shall be dismissed³³.

3. The Spanish Ombudsman (Defender of the People / Defensor del Pueblo)

3.1. Statute

The Ombudsman was firstly established by the 1978 Spanish Constitution and followed the Portuguese model³⁴. Article 54 of the Spanish Constitution states that an organic act shall regulate the institution of the Ombudsman as High Commissioner of the Parliament (Las Cortes Generales)³⁵, appointed by it to defend the rights contained in Part I of the Constitution; for this purpose, the Ombudsman may supervise the activity of the Administration and report thereon to the Parliament. Currently, the Ombudsman's statute is legally enshrined in Organic Act No. 3/1981, April 6, which was later modified by Organic Act No. 2/1992, March 5. In this context, Autonomic Ombudsmen

²⁹ Articles 29 and 30 of the Law No. 9/91.

³⁰ Article 38 Law No. 9/91.

³¹ Articles 32 and 33 Law N° 9/91.

³² Article 35 Law N° 9/91.

³³ Article 27 Law N° 9/91.

³⁴ As stated by Alvaro Gil Robles, cf. Pluralidade..., cit., p. 33.

³⁵ The name of the Spanish Parliament is "Las Cortes Generales" (the General Assembly).

were also created. The first of them began his work in 1984^{36, 37}.

According to Article 2 (1) of the Organic Act No. 3/1981, the Ombudsman is elected by the Parliament for a term of five years whenever necessary. Article 3 of Organic Act No. 3/1981 lays down that any Spanish citizen who has attained legal majority and enjoys full civil and political rights may be elected Ombudsman. In addition, according to Article 5 (1) of Organic Act No. 3/1981, the Ombudsman shall only be relieved of his duties in any of the following cases: resignation, expiry of term of office, death or unexpected incapacity, flagrant negligence in fulfilling the obligations and duties of his office non-appealable criminal conviction. The post shall be declared vacant by the Speaker of Congress in the event of death, resignation or expiry of the term of office (Article 5 (2), first part, of Organic Act No. 3/1981). However, in all other cases it shall be decided by a three-fifths majority of the Members of each House, following debate and the granting of an audience to the person concerned (Article 5 (2), second part, of Organic Act No. 3/1981).

Article 6 (1) of Organic Act No. 3/1981 states that the Ombudsman shall not be subject to any binding terms of reference whatsoever, he shall not receive instructions from any authority and he shall perform his duties independently and according to his own criteria. Moreover, the Ombudsman shall enjoy immunity. Consequently, he may not be arrested, subjected to disciplinary proceeding, fined, prosecuted or judged on account of opinions he may express or acts he may commit in performing the duties of the office. In all other circumstances, and while he continues to perform his duties, the Ombudsman may not be arrested or held in custody except in the event of being found in the act of committing an offence³⁸. Furthermore, the post of Ombudsman is incompatible with any elected office, with any political position or activities involving political propaganda, with remaining in active service in any Public Administration, with belonging to a political party or performing management duties in a political party or in a trade union, association or foundation or employment in the service thereof, with practising the professions of judge or prosecutor, and with any liberal profession or business or working activity (Article 7 (1) of Organic Act No. 3/1981).

The Ombudsman is assisted by two deputies nominated by the parliamentary groups. This solution has been particularly criticized not only because it compromises the independence of his body, but also because it can hamper the functioning of the institution if there is a “clash of ideological backgrounds” between the DP and the assistants³⁹.

3.2. Competences and powers

The main powers of the Ombudsman shall be:

(1) To pursue, ex officio or in response to a request from the party concerned, any investigation in order to clarify the actions or decisions of the Public Administration and its agents regarding citizens, and the protection of their rights, as established in the provisions of Article 103 (1)⁴⁰ of the Spanish Constitution. As a consequence, the Ombudsman has the authority to investigate the activities of Ministers, administrative authorities, civil servants and any person acting in the service

³⁶ Laura Diez Bueso, “Spain’s parliamentary Ombudsman scheme”, in *Righting wrongs, The Ombudsman in six continents*, ed. Roy Gregory – Philip Janes Gidding, International Institute of Administrative Sciences, Amsterdam – IOS Press, 2000, p. 325.

³⁷ Laura Diez Bueso, “Spain’s parliamentary Ombudsman scheme”, *op. cit.*, loc.cit.

³⁸ In decisions regarding his accusation, imprisonment, prosecution and trial, the Criminal Division of the High Court has exclusive jurisdiction (Article 6 (3), second part, of Organic Act No. 3/1981).

³⁹ Laura Diez Bueso, *op. cit.* p. 325.

⁴⁰ Article 103 (1) of the Spanish Constitution provides that the Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficiency, hierarchy, decentralization, deconcentration and coordination, and in full subordination to the law.

of the Public. In addition, the Ombudsman may in all cases, again whether ex officio or at the request of a party concerned, supervise the activities of the Autonomous Communities, within the scope of his competence⁴¹.

(2) Whenever the Ombudsman receives complaints regarding the functioning of the Administration of Justice, he must refer them to the Public Prosecutor, who will investigate and take appropriate legal action, or else refer them to the General Council of the Judiciary, according to the type of complaint involved, independently of any reference that he may make to the matter in his annual report to the Parliament (Article 13 of Organic Act No. 3/1981).

(3) The Ombudsman shall also protect the rights proclaimed in Part I of the Spanish Constitution in the field of Military Administration, without however causing any interference in the command of National Defence.

(4) The Ombudsman is not empowered to modify or overrule the acts and decisions of the Public Administration, but may suggest modifications in the criteria employed in their production. Moreover, if as a result of the investigations the Ombudsman should reach the conclusion that rigorous compliance with a regulation could lead to situations that are unfair or harmful to those persons thereby affected, he should suggest to the competent legislative body or the Administration that it be modified. If action has been taken in connection with services rendered by private individuals with due administrative authorization, the Ombudsman may urge the competent administrative authorities to exercise their powers of inspection and sanction (Article 28 of Organic Act No. 3/1981).

(5) Additionally, the Ombudsman has legal standing to present appeals arguing unconstitutionality and individual appeals for relief, as provided by the Constitution and the Organic Act Regarding the Constitutional Court (Article 29 of Organic Act No. 3/1981).

(6) Furthermore, the Ombudsman may, in the course of the investigations, give advice and make recommendations to authorities and officials in the Public Administration, remind them of their legal duties and make suggestions regarding the adoption of new measures (Article 30 (1), first part, of Organic Act No. 3/1981).

(7) Finally, the Ombudsman shall inform the Parliament every year of the action that he has taken in an annual report (Article 32 (1) of Organic Act No. 3/1981).

In order to pursue these goals the Ombudsman has broad powers of investigation, such as the power to request all kinds of information and documentation from public authorities, to visit public departments, make interviews and ask for classified documents, if necessary.

Within the various competences of the Ombudsman, the one that has been raising certain doubts in literature concerns the granting of legal standing to the Spanish Ombudsman to appeal on grounds of unconstitutionality against law and norms of the State or the Autonomous Communities, as it may interfere with the legislative activity (even if the appeal does not suspend the law).

Certain authors consider this solution very positive as it proves the independence of the Spanish Ombudsman from the Parliament, increases the legitimacy of the Ombudsman and “opens a more neutral channel to urge the control of constitutionality of laws outside the more directly political attitudes of other legitimate individuals like the Members of Parliament and public institutions”⁴².

⁴¹ Articles 9 and 13 of the Organic Act No. 3/1981.

⁴² Juan Vintó Castells, “The Ombudsman and the parliamentary committees on human rights in Spain”, in *Human rights commissions and ombudsman offices: national experiences*, ed. Kamal Hussein, L. F. M. Besslink, H. S. G. Selassie, E. Volker, Kluwer Law International, The Netherlands, 2000, p. 411.

On the other hand, it is invoked the “risk of politicization of the institution”, which can only be avoided with a cautious attitude by the Ombudsman⁴³.

Finally, it has been argued⁴⁴ that some of the weakest aspects of the Ombudsman are the lack of information of the average citizens (particularly those less favoured) concerning the powers of the Ombudsman and the length of the procedure, although there has been a significant evolution concerning this last aspect⁴⁵.

3.3. *Complaints and procedure*

Any individual or legal entity, who invokes a legitimate interest, may address to the Ombudsman without any restrictions whatsoever (Article 10 (1), first part, of Organic Act No. 3/1981). In other words, there are no legal impediments on the grounds of nationality, residence, gender, legal minority, legal incapacity, confinement in a prison or, in general, any special relationship of subordination to or dependence on a Public Administration or authority (Article 10 (1), second part, of Organic Act No. 3/1981). Additionally, individual Deputies and Senators, investigatory Committees or those connected with the general or partial defence of public rights and liberties and especially those established in Parliament, may, in writing and stating their grounds, request the intervention of the Ombudsman to investigate or clarify any actions, decisions or specific conducts of the Public Administration which may affect an individual citizen or group of citizens and which fall within his competence (Article 10 (2) of Organic Act No. 3/1981). Nevertheless, no administrative authority may submit complaints to the Ombudsman regarding affairs within its own competence (Article 10 (3) of Organic Act No. 3/1981) and he shall not investigate individually any complaints that are pending judicial resolution (article 17).

According to Article 15 (1) of Organic Act No. 3/1981, all complaints submitted must be signed by the party concerned, giving his name and address in a document stating the ground for the complaint, on ordinary paper and within a maximum of one year from the time of becoming acquainted with the matters giving rise to it. All action by the Ombudsman shall be free of charge for the party concerned, and the assistance of a solicitor or barrister shall not be compulsory.

Concerning the time limit to present the complaint, it must be pointed out that after one year the citizen may still ask the deputy or directly the Ombudsman to initiate the procedure on his own initiative⁴⁶.

Once a complaint has been accepted, the Ombudsman shall begin appropriate summary informal investigations to clarify the allegations contained therein (Article 18 (1), first part, of Organic Act No. 3/1981). In all cases, he shall report the substance of the complaint to the pertinent administrative agency or office for the purpose of ensuring that a written report be submitted within fifteen days by its director (Article 18 (1), second part, of Organic Act No. 3/1981)⁴⁷.

Article 17 No. 4 provides: “The Ombudsman shall reject anonymous complaints and may reject

⁴³ *op. cit., loc. cit.* The Ombudsman has used this mechanism with caution concerning, among other matters, asylum, trade union freedom and military service. The same caution was used concerning his power to present “recurso de amparo” (appeal for protection). See Laura Diez Bueso, *op. cit. loc. cit.*

⁴⁴ Laura Diez Bueso, *op. cit.*, p. 335.

⁴⁵ See *infra* the *praxis* in the Spanish context.

⁴⁶ Sustaining this solution, see Alvaro Gil Robles, *El defensor del pueblo – Comentarios en torno a una proposición de Ley Organica*, Madrid, Editorial Civitas, 1979, p. 95.

⁴⁷ Article 18 (2), first part, of the Organic Act No. 3/1981 states that the refusal or failure on the part of the civil servant or his superiors responsible for sending the initial report requested may be considered by the Ombudsman as a hostile act which obstructs to his functions. Therefore, he shall immediately make such an act public and draw attention to it in his annual or special report, as the case may be, to Parliament (Article 18 (2), second part, of Organic Act No. 3/1981).

those in which he perceives bad faith, lack of grounds or an unfounded claim, and in addition those whose investigation might infringe the legitimate rights of a third party. His decisions may not be appealed”.

The Ombudsman is assisted by a First Deputy and a Second Deputy to whom he may delegate his duties and who shall replace him, in hierarchical order, in their fulfilment, in the event of his temporary incapacity or his dismissal (Article 8 (1) of Organic Act No. 3/1981)⁴⁸. Besides this organic assistance, all public authorities must give preferential and urgent assistance to the Ombudsman in his investigations and inspections (Article 19 (1) of Organic Act No. 3/1981). Should the complaint to be investigated concern the conduct of persons in the service of the Administration in connection with the duties they perform, the Ombudsman shall so inform them, as well as the immediate superior or body to which the former are attached (Article 20 (1) of Organic Act No. 3/1981). The persons concerned shall reply in writing, supplying whatever documents and supporting evidence they might consider appropriate, and the Ombudsman may verify the veracity of such documents and propose to the civil servant concerned that he be interviewed, in order to furnish further details (Article 20 (2 and 3) of Organic Act No. 3/1981)⁴⁹.

Concerning the request of documents, the Ombudsman may request the public authorities to furnish all the documents he considers necessary for the performance of duties, including those classified as confidential. If the investigations conducted reveal that the complaint was presumably the result of abuse, arbitrariness, discrimination, error, negligence or omission on the part of a civil servant, the Ombudsman may request the person concerned to state his views on the matter⁵⁰. The persistence in a hostile attitude or the hindering of the work of the Ombudsman by civil servants, officials or persons in the service of the Public Administration, may be the subject of a special report (it is a public statement of lack of collaboration), in addition to being stressed in the appropriate section of his annual report⁵¹. Furthermore, a civil servant who obstructs an investigation by the Ombudsman by either refusing to send the reports he requests or to facilitate his access to the administrative records or documents necessary for the investigation, or is negligent in so doing, shall be guilty of an offence of disobedience (Article 502 of the Penal Code)⁵². Finally, if in the performance of the duties of his office, the Ombudsman should obtain knowledge of presumably criminal acts or behaviour, he must immediately notify the Attorney-General⁵³. The Ombudsman may also, *ex officio*, bring actions for liability against all authorities, civil servants and governmental or administrative agents, including local agents, without needing under any circumstances to previously submit a written claim⁵⁴.

The Ombudsman shall inform the party concerned (or the public authority involved) of his decision as a result of his investigations and actions taken⁵⁵ and about the most appropriate channels to take action⁵⁶. However, his decision has not coercive powers (like judicial bodies). He only has the “power of direction” to give warnings, reminders, recommendations and suggestions⁵⁷. In other words, the Ombudsman may, in the course of the investigations, give advice and make

⁴⁸ The Ombudsman shall appoint and dismiss his Deputies, following approval by both Houses (Article 8 (2) of Organic Act No. 3/1981).

⁴⁹ Article 20 (4) of the Organic Act No. 3/1981 provides that the information a civil servant may furnish through personal testimony in the course of an investigation shall be treated as confidential.

⁵⁰ Articles 22 and 23 (1) of Organic Act No. 3/1981.

⁵¹ Article 24 of Organic Act No. 3/1981.

⁵² The penalty is a fine from 3 to 12 months and the prohibition to hold a public post (between 6 and 12 months).

⁵³ Article 25 of Organic Act No. 3/1981.

⁵⁴ Article 26 of Organic Act No. 3/1981

⁵⁵ Article 31.

⁵⁶ Article 17.

⁵⁷ As already explained (see Laura Diez Bueso, *op. cit.*, *loc. cit.*), usually, a warning is a remark on behaviour or to stop a particular behaviour; a reminder refers to cases in which the administration infringes the law; and recommendations and suggestions are adopted in order to propose a change of an act or judgement.

recommendations to authorities and officials in the Public Administration, remind them of their legal duties and make suggestions regarding the adoption of new measures . In all cases such authorities and officials shall be obliged to reply in writing within a maximum period of one month⁵⁸. If within a reasonable period of time after such recommendations are made appropriate steps are not taken to implement them by the administrative authority concerned, or if the latter fails to inform the Ombudsman of its reasons for non-compliance, he may inform the Minister of the Department concerned, or the highest authority of the Administration concerned, of the particulars of the case and the recommendations made.

4. The praxis of the Ombudsman

4.1. In Portugal

Every year the Portuguese Ombudsman's presents a report to Parliament regarding his activity. We will focus on the last Report available concerning 2014 and presented in 2015 and refer mainly to the Ombudsman activity in the complaints procedures and in the international relations⁵⁹.

Concerning the first topic – Ombudsman's activity in the complaints procedures – the Report refers that in 2014, 8526 cases were opened, which means that in the year under review the number of new cases remained in roughly equal value compared to 2013, with a slight increase of 5. Of the total cases mentioned, 8518 resulted in complaints to the Ombudsman, the majority of them by individuals over 50 years old (almost 60%); in addition, the comparison of complainants by gender is close to parity⁶⁰; and only 8 procedures were opened on the Ombudsman's initiative.

According to the Report, 8114 cases were closed. In 3179 procedures, there was an agreement with the object of the complaint or a fair solution was achieved according to the complainant's claim (corresponding to 39.2% of the total cases that are closed). The proportion of cases where the complaint was dismissed or considered useless to conduct any other diligence also increased from 2724 (in 2013) to 3134 closed cases (which corresponds to 38.6% of closed cases). In 13 procedures, the cases were closed by issuing a recommendation (8 recommendations); the same applies to 6 cases in which the intervention of the Constitutional Court was requested (4 requests made)⁶¹. The remaining closed cases were divided between referral to another entity or most appropriate ways (590 cases); by issuing a remark to the addressed entity (in 260 cases); or simply were subject to a summary decision (492 cases); or there was explicit or implied withdrawal of the complaint.

Concerning the duration of the cases closed in 2014: 26% were closed within the first thirty days after their opening (corresponding to 2115 cases), 56% in the first three months (corresponding to 4568 cases) and 76% in first six months (corresponding to 6164 cases); considering the full year of 2014, the proportion of closed cases before twelve months after their opening registered a value of 91%⁶².

In 2014, the four most discussed issues presented to the Ombudsman – representing 55% of a total universe of 8606 – were social security, public employment, taxation and administration of Justice and the issues with a greater increase were consumer rights, land planning, urban planning and housing and administration of Justice.

⁵⁸ Article 30 of Organic Act No. 3/1981.

⁵⁹ Cf. <http://www.provedor-jus.pt/?idc=16&idi=15658> (last visited 30.11.2015).

⁶⁰ Report of the Portuguese Ombudsman, 2014, p. 7.

⁶¹ Report cit., p. 21.

⁶² Report, cit. p. 22.

Excluding the complaints filed by employees in the public sector, there has been an increase in the proportion of complaints in which the targeted entity is the Ministry of Solidarity, Employment and Social Security (from 37% overall complaints concerning Central Administration to 43%) and the Ministry of Finance (from 22% overall complaints regarding Central Administration to 25%). As expected, given the high number of workers, the Ministries of Education and Science and Health show more significant changes in reverse (respectively, from 12% to 5% and from 8% to 6%).

Concerning the promotion and protection of human rights, it is worth mentioning the complaints requesting the Ombudsman to recommend the partial repeal or amendment of certain laws, namely laws concerning new urban lease regime and tax law. The majority of the laws followed the Ombudsman's suggestions.

In the international context, the recognition of the Portuguese Ombudsman as a National Human Rights Institution, accredited with A-status by the International Coordinating Committee of National Human Rights Institutions (ICC), involves a wide range of actions in order to maintain that status. Therefore, in 2014, the Ombudsman met and cooperated with several homologous institutions, as well as with other entities with whom he shares a similar mandate in the defense and promotion of human rights, namely the Regional Representative for Europe of the Office of the High Commissioner for Human Rights, the Defensor del Pueblo in Madrid, the Municipal Secretary for Human Rights and Citizenship of the City of São Paulo, Brazil, and the Ombudsman of Angola.

4.2. *In Spain*

In 2014, the Spanish Ombudsman launched a transparency portal that allows access to the developed activity (which has received more than 400 000 visits) and where complainants can follow the status of their complaints online. In addition, "for the first time", the report mentions the average times of the Spanish Ombudsman in replying to the citizens. According to the report, the complaint was usually admitted in 36 days and the decision adopted in 57 days (after the answer of the public authorities)⁶³.

Concerning the number of complaints, in 2014, the Ombudsman received 23.186 complaints (mainly by post -9026; and only 489 were ex officio) and the issues concerned social welfare (minimex), taxes and delays in the decisions of the public authorities⁶⁴. The closed cases were 8103 and the dismissed ones 8 565. The Ombudsman adopted 467 recommendations (217 were followed), namely concerning tax laws and failing firm law. He also analyzed the appeals on unconstitutionality: 287 were rejected, one presented and 2 are being studied. The number of appeals on the grounds of unconstitutionality has, therefore, dropped considerably compared to previous years, in which many civil servants whose bonus pay had been eliminated requested the filing of appeals.

To prevent torture and/or protect human rights, the Spanish Ombudsman office visited prisons and centers of detention. Finally, an international project involving France and Spain was created in order to help the creation of Ombudsmen in other countries together with a Prize to be awarded to ONG and entities that contribute to the activity of the Spanish Ombudsman.

Lastly, the relations with the Autonomous Community Ombudsmen have also been ones of cooperation and respect in their respective fields of authority, and attempts have been made to avoid duplicating measures.

⁶³ Cf <https://www.defensordelpueblo.es/en/> (last visited 30.11.2015). Report 2014, p. 20.

⁶⁴ Report, cit., p. 7. In addition, the Ombudsman conducted many studies in telecommunications, health, etc.

4.3. Preliminary conclusions

Although there are some differences between the Portuguese and Spanish Ombudsmen's status and practices, the reports confirm that there are many similarities between them. In addition, the difficult economic situations experienced in Portugal and Spain has drawn attention to the role of Ombudsman, which is reflected in the number of complaints, in their subject matter, as well as in the requests for appeals on the grounds of unconstitutionality. On the other hand, we noticed that the majority of complaints are dismissed; those approved are decided within one year. Concerning the recommendations adopted we also confirmed that the majority of them are taken into account by the legislative bodies and that both Ombudsmen have developed relevant activities at the international level.

5. Conclusion

Ombudsman institutions, such as the Portuguese and Spanish ones, which comply with the Paris Principles, can play an important role in advancing the rule of law and protecting human rights at the national level. In fact, in Portugal and Spain, the Ombudsman is inspired by the traditional Swedish model. Therefore, both the Portuguese Ombudsman and the Spanish Ombudsman are established in the Constitution; they are not dependent from ordinary laws, which can change rapidly. They are nominated by Parliament, which assures their independence and they have consistent powers in order to fulfill a double function: monitor public authorities and protect human rights. In this context, both Portuguese Ombudsman and Spanish Ombudsman may serve as good examples of NHRIs that can contribute to the promotion of democracy, Rule of Law and Human Rights.

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